SERVED: December 6, 1994

NTSB Order No. EA-4280

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

JAMES LOUIS MARTIN, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 175-EAJA-SE-8788RM

OPINION AND ORDER

The Administrator has appealed from the initial decision of Administrative Law Judge Jerrell R. Davis, served September 21, 1993, granting applicant's request for $60,617.43 in attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.[1] For the reasons discussed below, the Administrator's appeal is granted, and the award of fees and

[1] A copy of the initial decision is attached.

expenses is reversed.

Background

This EAJA claim arose from an enforcement action in which the Administrator sought to suspend applicant's [in that action referred to as respondent] airline transport pilot certificate for 90 days based on his operation of a Bell UH-1 helicopter over a congested residential area in Fremont, California, in alleged violation of 14 C.F.R. 91.79(a) and (d), and 91.9.[2] At the evidentiary hearing held on May 6 and 7, 1993, the Administrator presented testimony of three residents of the area (and the

[2] Section 91.79 [now recodified as 91.119] provided:

§ 91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

* * *

(d) *Helicopters.* Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the Administrator.

Section 91.9 [now recodified as § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

written statement of a fourth)[3] indicating that they had observed the subject helicopter flying and hovering at altitudes as low as 30 feet above the ground over houses and streets in the neighborhood, causing trees, leaves, garbage cans, and other items to be blown around. The height-velocity curve for this helicopter indicates that operations at the altitudes and airspeeds testified to by the Administrator's witnesses are to be avoided because an emergency landing would be hazardous.[4]

Respondent admitted flying over the area, at the request of one of his crewmembers who lived in the neighborhood, but maintained that he flew no lower than 300 feet over the area, and that his lowest airspeed was 20-25 knots (over a baseball diamond adjacent to the neighborhood). He specifically denied hovering over houses or streets in the area, and claimed that his operation was at all times in the "safe" zone of the height-velocity curve for this helicopter. When confronted with a letter in which he admitted that he had conducted a "hovering operation" over the baseball field, respondent explained that a

[3] The Administrator's counsel indicated at the hearing that yet another witness was available to testify to the allegedly low flight, but he chose not to call her because he felt her testimony would be merely cumulative of that already offered. (Tr. 214.)

[4] A height-velocity curve is a graphic illustration indicating, for various airspeed/altitude combinations, areas of operation which are considered safe (i.e., test data indicate that, in the event of an engine failure, an autorotational landing can be safely accomplished at these airspeed/altitude combinations), and areas which are to be avoided (i.e., test data indicate that an autorotational landing would be hazardous). Both parties proceeded on the premise that operations outside of the "safe" zones would be in violation of the cited regulations.

very slow speed operation can be termed a hovering operation, and noted that his slow air speed over the field, coupled with a turn at that point, could have appeared as a stationary hover to observers on the ground.

After hearing the evidence, the law judge noted the vast disparity between respondent's version of events and the events allegedly observed by the complaining witnesses, and indicated an unwillingness to believe that the complaining witnesses would fabricate their testimony. (Tr. 563.) Nonetheless, in his initial decision, the law judge made a credibility assessment rejecting the testimony of the Administrator's eyewitnesses, finding that the noise generated by the UH-1 helicopter flown by respondent "instilled apprehension or fear in the minds of the three housewives which materially distorted their perceptions of what they actually saw," and concluded that their testimony was "almost inherently incredible." (Tr. 634-35.) This conclusion was apparently based on respondent's position that a proper investigation would have revealed the impossibility of some of the maneuvers allegedly observed,[5] and that a comparison of the dimensions of the helicopter (57 feet from main rotor tip to tail rotor tip) with measurements of the spaces where the helicopter was allegedly observed[6] would have revealed the impossibility of

[5] E.g., alleged "darting" movements by the 13-seat helicopter, alleged hovering five feet above a house without causing damage, and the fact that one witness recalled no rotor wash while others recalled it to be excessive.

[6] E.g., hovering 5 feet above a single-story house, and flying between two trees. We note that further explanation given

those alleged observations.

In sum, in light of his rejection of the eyewitness testimony as incredible, the law judge found an insufficient evidentiary basis in the record for the Administrator's allegation that respondent's operation was conducted at such an altitude and airspeed that an emergency autorotation landing could not have been successfully made without creating hazard to persons and property on the surface. The law judge further found that this lack of substantiation would have been revealed by a proper investigation. This EAJA claim followed.

Applicant's EAJA claim

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). For the Administrator's position to be found substantially justified it must be reasonable in both fact and law, i.e., the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. Application of U.S. Jet, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). This standard is less stringent than that applied at the merits

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by the witness who testified to observing the helicopter fly "between" the trees, could be read as indicating that the bottom of the helicopter was level with the top of (at least one of) those trees.

phase of the proceeding, where the Administrator must prove his case by a preponderance of the reliable, probative, and substantial evidence. Accordingly, the FAA's failure to prevail on the merits does not preclude a finding that its position was nonetheless substantially justified under the EAJA. See Application of U.S. Jet at 3; Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

In considering whether the Administrator's position in this case was substantially justified, the law judge noted that the legislative history of the EAJA indicated that awards were contemplated where the government lost "weak or tenuous" cases, and expressed his opinion that the Administrator here had pursued "a case that was, at best, 'weak or tenuous.'" (Decision at 3.) He again indicated his belief that "a complete and unbiased investigation would have absolved [a]pplicant of any FAR infraction." Id. After concluding that all of the fees and expenses requested (including those generated in connection with applicant's ultimately unsuccessful motion to dismiss for lack of jurisdiction)[7] were reasonable, the law judge granted the

[7] At the first administrative hearing in this case (on March 29, 1989), the law judge granted respondent's motion to dismiss the case for lack of jurisdiction, holding that respondent was not a "civil" pilot within the meaning of section 609 of the Federal Aviation Act (then codified at 49 U.S.C. App. 1429(a)), because he was piloting a "public" aircraft operated by NASA, respondent's employer. However, we granted the Administrator's appeal and reversed that dismissal, noting precedent establishing that pilots of "public" aircraft are not exempt from the regulations here at issue, and remanded the case to the law judge for a hearing on the merits. Administrator v. Martin, NTSB Order No. EA-3423 (1991). Respondent's appeal of our decision to the U.S. Court of Appeals for the Ninth Circuit was unsuccessful.

application in its entirety.

On appeal, the Administrator argues that his position was substantially justified. Specifically, the Administrator asserts that the eyewitness accounts of applicant's flight provided a reasonable basis in truth for the facts alleged, and that, if believed, those statements would have established a violation of the cited regulations. The Administrator contests the law judge's finding that the investigation in this case was flawed, maintaining that the FAA had no valid reason to discredit the eyewitness accounts in their entirety. Because we agree that the Administrator was substantially justified in pursuing this enforcement action, we need not address the Administrator's challenge to the amount of fees and expenses granted by the law judge as unjustified and unreasonable.

Substantial justification for the FAA's position cannot be found lacking simply because the law judge did not credit the testimony of the Administrator's witnesses.[8] When key factual issues hinge on witness credibility, the Administrator is

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Martin v. NTSB, No. 91-70754 (9th Cir. June 16, 1992), reconsideration denied, August 5, 1992.

Although the issue is moot in light of our disposition of this case, we note that fees generated in connection with judicial review are not recoverable from the agency under the EAJA. Administrator v. Smith, NTSB Order No. EA-4096 (1994).

[8] See Catskill Airways, Inc. v. Administrator, 4 NTSB 799, 800 (1983), where we expressed agreement with this general proposition, but noted that the rejected testimony must be otherwise sufficient to sustain the charge it was offered to support. In that case, we found that the proffered testimony, even if believed, was insufficient to support the Administrator's charges.

substantially justified -- absent some additional dispositive evidence -- in proceeding to a hearing where credibility judgments can be made on those issues.[9] Even assuming, as applicant maintains, that "measuring the helicopter's alleged position from houses, plotting [its] flightrack as described by the [] witnesses, and estimating the height of adjacent buildings, trees and poles in relation to the helicopter's alleged height" would have revealed that applicant's helicopter could not have flown or hovered exactly where the witnesses said they saw him,[10] the Administrator was not therefore required to totally discredit the witnesses' statements, or to anticipate that the law judge would do so. Indeed, we have made clear that a law judge may reject some aspects of a witness's testimony, and still accept the remainder as probative evidence of a violation.[11] Accordingly, we think the Administrator could

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[9] See Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994).

[10] Although not appealed by the Administrator, and therefore not directly before us, we note our disagreement with the law judge's conclusion that the witnesses' testimony of low flight and hovering was inherently incredible in light of these measurements. To the contrary, we see no evidence in the record, and applicant cites to none, that the measurements and analysis suggested by respondent would have established that the violative maneuvers allegedly observed by the Administrator's witnesses could not possibly have occurred.

[11] See Administrator v. Beckman, NTSB Order No. EA-4207 at 7 (1994), where we held that, despite the law judge's rejection of a witness's testimony that respondent flew through a cloud, he could still rely on that witness' testimony to the extent that it also indicated an unlawful proximity to clouds. See also Administrator v. Crowe, 5 NTSB 1372 (1986), where the law judge rejected testimony that the respondent's aircraft came within 3 to 5 feet of the witness, finding that it was more likely the

reasonably rely on witness statements (all generally consistent with one another)[12] indicating that respondent flew and hovered as low as 30 feet above the ground over houses and residential streets, causing significant rotor wash, as sufficient support for his position that respondent's operation was too low and outside of the "safe" zone of the height-velocity curve.[13]

Nor can we find fault with the scope or extent of the Administrator's investigation into this matter.[14] Even assuming that the measurements applicant claims should have been taken would have revealed some inaccuracies in the witnesses' recollections, we disagree that any such inaccuracies were so

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aircraft passed within 20 feet of him. The Board concluded that the Administrator's evidence did not lose its substantial, probative and reliable character simply because the law judge found it inaccurate to some extent.

[12] Despite applicant's insistence that they were fatally inconsistent with one another, we think that the witnesses' recollections of the approximate locations, direction, and height of the helicopter during its flight over the neighborhood indicate remarkable consistency, especially in view of the fact that their testimony was given more than six years after the event. None of the witnesses were pilots, and they all made clear that their estimates were simply their best approximations, based on the known height of nearby trees, houses, and other structures.

[13] The height-velocity curve for this helicopter indicates that the lowest safe hovering altitude is approximately 460 feet.

[14] Applicant also challenges the qualifications of the investigating inspector, noting that he is not a helicopter expert, and asserts that a helicopter expert would have recognized the implausibility of the maneuvers allegedly observed. However, as already noted, we disagree with applicant's position that the witnesses' recollections displayed inaccuracies of such a magnitude that they had to be entirely discounted. Moreover, we note that the case was apparently reviewed by another inspector who was a helicopter expert, and who also testified at the hearing.

egregious or potentially exculpating as to require a change in the Administrator's position. It must be remembered that, according to the height-velocity curve for this helicopter, any hovering below 460 feet above the ground would be considered hazardous, and the eyewitness reports indicated that applicant hovered between 30 and 60 feet above the ground. It would be natural to expect some degree of inaccuracy in the witnesses' estimates and recollections, but the Administrator cannot be expected to have foreseen that the law judge would find their estimates to be so grossly inaccurate as to place applicant's operation outside the hazardous zone of the height-velocity curve.

In sum, we find that the Administrator's position in this case was substantially justified, in that it had a reasonable basis in fact and law. Specifically, we find that there was a reasonable basis in truth for the facts alleged by the Administrator. Thus, attorney fees and expenses were erroneously granted.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and

2. The initial decision awarding applicant $60,617.43 in attorney fees and expenses is reversed.

HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order. HALL, Chairman, did not concur. Member LAUBER did not participate.